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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 HECTOR FRANCISCO DIAZ,) CASE NO. C08-1371-JLR
09) (CR07-108-JLR)
Petitioner,)
10)
v.)
11) REPORT AND RECOMMENDATION
UNITED STATES OF AMERICA,)
12)
Respondent.)
13

14 Petitioner Hector Francisco Diaz, proceeding *pro se*, moves to vacate, set aside, or correct
15 his sentence pursuant to 28 U.S.C. § 2255. Mr. Diaz asserts ineffective assistance of counsel in
16 violation of the Sixth Amendment. Having considered the parties' submissions and the balance
17 of the record, the Court recommends that Mr. Diaz's § 2255 motion be denied and this action be
18 dismissed with prejudice.

19 **BACKGROUND**

20 On March 21, 2007, a federal grand jury returned an eight-count indictment charging Mr.
21 Diaz with one count of conspiring to distribute methamphetamine and seven additional counts of
22 distribution of methamphetamine. (CR07-108-JLR (CR) Dkt. 1.) Each of the additional seven

01 distribution counts corresponded to a separate sale of methamphetamine by Mr. Diaz to an
02 undercover detective between July and October 2006. (Presentence Report (PSR) ¶¶ 5-16. ¹)
03 Investigators had audio and video recordings of Mr. Diaz negotiating with the undercover
04 detective, conducting drug transactions, and discussing future transactions. (PSR ¶¶ 8, 16; CR
05 Dkt. 14 (Plea Agreement) ¶ 7.)

06 Throughout his prosecution, Mr. Diaz was represented by Brian Tsuchida of the Federal
07 Public Defender's Office. On May 7, 2007, Mr. Diaz entered a guilty plea pursuant to a written
08 plea agreement to the first of the seven distribution counts (Count 2), in violation of 21 U.S.C. §§
09 841(a)(1), (b)(1)(B), and 18 U.S.C. § 2. (CR Dkt. 14 ¶¶ 1, 7.) The parties entered into the
10 following stipulation regarding Mr. Diaz's base offense level:

11 8. Sentencing Factors. The parties agree that the following Sentencing
Guidelines provisions apply to this case:

12 a. A base offense level of *at least* 26, based on Defendant's admission
13 that he delivered 56.3 grams of a substance containing a methamphetamine mixture
14 to the undercover officer on July 12, 2006. The parties reserve the right to present
evidence and/or argument regarding whether additional conduct should increase the
15 base offense level above 26, pursuant to the relevant conduct provisions of USSG §
2D1.1, n.12, and § 1B1.3(a)(2).

16 (CR Dkt. 14 ¶ 8 (emphasis in original).) On the admitted facts, Count 2 carried a mandatory
17 minimum sentence of 5 years' imprisonment and a statutory maximum of 40 years' imprisonment.
18 See 21 U.S.C. § 841(b)(1)(B)(viii); (CR Dkt. 14 ¶ 3.a).

19 The presentence report calculated Mr. Diaz's base offense level as 34, corresponding to
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22 ¹ The Presentence Report is filed in the underlying criminal case, CR07-108-JLR.

01 185.25 net grams of *actual* methamphetamine.² (PSR ¶ 22.) The PSR explained that the “relevant
02 conduct” provisions of USSG § 1B1.3(a)(2) and § 2D1.1 n.12 required that Mr. Diaz be held
03 accountable for the full quantity of drugs he sold to the undercover detective in all seven
04 transactions rather than just for the drugs from the admitted transaction in Count 2. (PSR ¶ 69.)
05 The PSR also added two levels for possession of a dangerous weapon, and awarded full credit for
06 acceptance of responsibility, for a total offense level of 33. (PSR ¶¶ 24, 29, 32.) At criminal
07 history category I, the Guidelines range recommended by the PSR was 135-168 months. (PSR
08 ¶ 57.) The Probation Officer recommended a sentence of 135 months. (PSR, Sentencing Rec.
09 at 1.)

10 Mr. Diaz and the government both objected to the PSR’s recommended two-level gun
11 enhancement as unsupported by the facts and contrary to the plea agreement. (CR Dkt. 17, at 3-4;
12 CR Dkt. 18, at 3-4; Dkt. 14 ¶ 8.b.) The parties differed, however, about how to consider relevant
13 conduct, which led to different recommendations regarding offense level, the Guidelines advisory
14 range, and proper sentence. The government agreed with the PSR’s relevant conduct
15 determination and recommended 108 months of imprisonment. (CR Dkt. 17, at 4.) This was
16 based on an offense level of 31 and an advisory range of 108-135 months. (*Id.*) Mr. Diaz’s
17 counsel filed a ten-page sentencing memorandum in which he argued for the statutory mandatory
18 minimum sentence of 60 months’ imprisonment. (CR Dkt. 18, at 1.) This was based on the plea
19 agreement’s reference to a base offense level of 26. Defense counsel argued that after the
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21 ² The Sentencing Guidelines direct that the offense level for methamphetamine is dictated
22 by the entire weight of the usable *mixture*, or the weight of the *actual* drug, whichever is greater.
USSG § 2D1.1(c) n.(B).

01 adjustment for acceptance of responsibility, the Court could choose from among the following:
02 (a) offense level 23, advisory range 46-57 months; (b) offense level 29, advisory range 87-108
03 months; and (c) offense level 31, advisory range 108-135 months. (*Id.* at 3.)

04 On August 28, 2007, United States District Court Judge James L. Robart sentenced Mr.
05 Diaz to 108 months of imprisonment. Judge Robart reached a total offense level of 31 by
06 accepting the three-level reduction for acceptance of responsibility, rejecting the two-level gun
07 enhancement, and considering the other drug offenses as relevant conduct. (Dkt. 10, Att. 1
08 (Sentencing Tr.), at 15-18.) Mr. Diaz did not appeal his sentence and timely mailed the instant
09 petition on August 26, 2008. (Dkt. 2, at 1; Dkt. 10, at 10 & n.4.)

10 DISCUSSION

11 Mr. Diaz challenges the legality of his 108-month sentence on the basis of ineffective
12 assistance of counsel. Specifically, Mr. Diaz contends that he was deprived effective assistance
13 of counsel because his counsel Mr. Tsuchida (1) failed to argue that the inclusion of relevant
14 conduct violated the plea agreement and was inconsistent with Mr. Diaz's expectations; (2) chose
15 not to demand an evidentiary hearing that would have exposed the "inherently incredible" evidence
16 underlying the relevant conduct calculations; and (3) failed to object to, and argue against,
17 inclusion of relevant conduct in calculating Mr. Diaz's base offense level. (Dkt. 1, Att. 1, at 7-13;
18 Dkt. 13, at 1-9.)

19 The Sixth Amendment guarantees a criminal defendant the right to effective assistance of
20 counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts evaluate claims of
21 ineffective assistance of counsel under the two-prong test set forth in *Strickland*. Under that test,
22 a defendant must prove (1) that counsel's performance fell below an objective standard of

01 reasonableness and (2) that a reasonable probability exists that, but for counsel's error, the result
02 of the proceedings would have been different. *Id.* at 687-694.

03 When considering the first prong of the *Strickland* test, judicial scrutiny must be highly
04 deferential. *Id.* at 689. There is a strong presumption that counsel's performance fell within the
05 wide range of reasonably effective assistance. *Id.* The Ninth Circuit has made clear that "[a] fair
06 assessment of attorney performance requires that every effort be made to eliminate the distorting
07 effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to
08 evaluate the conduct from counsel's perspective at the time." *Campbell v. Wood*, 18 F.3d 662,
09 673 (9th Cir. 1994) (quoting *Strickland*, 466 U.S. at 689).

10 The second prong of the *Strickland* test requires a showing of actual prejudice related to
11 counsel's performance. In a guilty-plea case, "in order to satisfy the 'prejudice' requirement, the
12 defendant must show that there is a reasonable probability that, but for counsel's errors, he would
13 not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52,
14 59 (1985). The reviewing court need not address both components of the inquiry if an insufficient
15 showing is made on one component. *Strickland*, 466 U.S. at 697. Furthermore, if both
16 components are to be considered, there is no prescribed order in which to address them. *Id.*

17 **A. The Plea Agreement and Mr. Diaz's Expectations**

18 Mr. Diaz alleges that his counsel Mr. Tsuchida failed to perform his "Sixth Amendment
19 duty to demonstrate to the District Court that when Movant pled guilty he was clearly under the
20 assumption that he was only being held responsible for 56.3 grams of methamphetamine that was
21 delivered to an undercover police officer on July 12, 2006." (Dkt. 1, Att. 1, at 5.) Mr. Diaz's
22 assertion is contradicted by the plain language of the plea agreement and the statements he made

01 to the undersigned judge during his plea hearing.

02 Mr. Diaz’s plea agreement states that the base offense level would be “*at least* 26, based
03 on Defendant’s admission that he delivered 56.3 grams of a substance containing a
04 methamphetamine mixture to the undercover officer on July 12, 2006.” (CR Dkt. 14 ¶ 8.a
05 (emphasis in original).) The parties’ intent to make Level 26 the floor but not the ceiling is
06 explained in the sentence immediately following, wherein “[t]he parties reserve the right to present
07 evidence and/or argument regarding whether additional conduct should increase the base offense
08 level above 26, pursuant to the relevant conduct provisions of USSG § 2D1.1, n.12, and §
09 1B1.3(a)(2).” This unambiguous language provided that a higher base offense level was possible,
10 reserved the right to litigate for or against that possibility, and specified that the relevant conduct
11 provisions of the Sentencing Guidelines provided the legal basis for any potential increase. In the
12 plea agreement, Mr. Diaz stated: “Defendant agrees that Defendant has entered into this Plea
13 Agreement freely and voluntarily, and that no threats or promises, other than the promises
14 contained in this Plea Agreement, were made to induce Defendant to enter this plea of guilty.”
15 (CR Dkt. 14 ¶ 14.) At the plea hearing, Mr. Diaz affirmed that he had gone over the plea
16 agreement with counsel, that it had been translated into Spanish, and that he understood that the
17 parties reserved the right to present evidence on whether the base offense level should be higher
18 than 26.

19 It would have been frivolous for defense counsel to have argued at sentencing that a base
20 offense level above 26 was inconsistent with the plea agreement or Mr. Diaz’s expectations as
21 reiterated at the plea hearing. Mr. Tsuchida’s failure to make such an argument neither
22 demonstrated performance that fell below an objective standard of reasonableness nor had a

01 prejudicial effect on Mr. Diaz's sentence. To the extent Mr. Diaz contends that reliance on Mr.
02 Tsuchida's advice rendered his guilty plea involuntary (Dkt. 13, at 2), he cannot show the requisite
03 prejudice: both the written plea agreement and the plea hearing show Mr. Diaz's awareness of the
04 elements of the crime, the sentencing consequences, and the waived rights. Furthermore, Mr. Diaz
05 does not deny that the government possesses audio- and video-taped evidence of him repeatedly
06 dealing drugs to an undercover detective and he does not assert actual innocence.

07 Mr. Diaz has failed to demonstrate that Mr. Tsuchida provided ineffective assistance of
08 counsel because the inclusion of relevant conduct violated the plea agreement or because the
09 agreement was inconsistent with Mr. Diaz's expectations.

10 **B. Evidence Underlying Relevant Conduct Calculations**

11 Mr. Diaz contends that counsel provided ineffective assistance because Mr. Tsuchida "had
12 a duty to conduct an independent investigation" into the amount of methamphetamine reasonably
13 attributable to Mr. Diaz. (Dkt. 1, Att. 1, at 5.) According to Mr. Diaz, counsel's failure to seek
14 an evidentiary hearing about the evidence underlying the other drug transactions deprived him of
15 the opportunity to attack the credibility of "inherently incredible testimony by the Government's
16 informants hoping to receive reductions in their sentences by inculcating Movant without any
17 corroborating physical evidence whatsoever." (Dkt. 1, Att. 1, at 9.) Mr. Diaz also challenges
18 counsel's failure to attack the district court's drug quantity "approximation." (Dkt. 1, Att. 1, at
19 10-11.) None of Mr. Diaz's contentions are supported by the record.

20 The methamphetamine used to calculate Mr. Diaz's base offense level was sold by Mr.
21 Diaz himself directly to an undercover detective on seven different occasions during controlled,
22 monitored transactions verified by audio and video recordings. (PSR ¶¶ 7-14.) Such evidence

01 was not subject to the kind credibility attack that Mr. Diaz contends should have been levied
02 against government informants. Furthermore, the drug quantities used to calculate Mr. Diaz's
03 relevant conduct were not mere approximations; they were based on forensic chemical analyses
04 that yielded exact net weights for the evidence. (*Id.*)

05 It was not objectively unreasonable for Mr. Tsuchida to choose not to challenge the
06 admitted facts and instead pursue equitable and legal strategies designed to minimize the impact
07 of those facts on his sentence. *See Jackson v. Calderon*, 211 F.3d 1148, 1156 n.4 (9th Cir. 2000)
08 ("If counsel's choice was a reasonable tactical one, his performance was not deficient."). Mr. Diaz
09 therefore has not demonstrated ineffective assistance of counsel on this basis.

10 **C. Arguments Against Inclusion of Relevant Conduct**

11 Mr. Diaz argues that Mr. Tsuchida "abandoned his role as Movant's advocate and
12 therefore rendered ineffective assistance of counsel by failing to object nor raise the issue of the
13 drug quantity consistent with the applicable base offense level Movant admitted to." (Dkt. 1, Att.
14 1, at 12.) Mr. Diaz's contention is contradicted by the record. Mr. Tsuchida argued vigorously
15 both in his Sentencing Memorandum and orally at the sentencing hearing that the sentencing court
16 should not include the six uncharged drug sales as relevant conduct in calculating the base offense
17 level or, alternatively, should not include the full quantity of drugs suggested in the PSR.

18 Defense counsel acknowledged that the sentencing court could (but should not) consider
19 the six uncharged offenses to be relevant conduct under the Guidelines. (Dkt. 10, Att. 1, at 4.)
20 Such a concession was prudent given the evidence and the proper application of the Guidelines.
21 USSG §§ 1B1.3(a)(2), 2D1.1 n.12; *see United States v. Grissom*, 525 F.3d 691, 697 (9th Cir.
22 2008) (reversing and remanding for resentencing where a district court refused to apply relevant

01 conduct provisions to dismissed drug transactions). Mr. Tsuchida then argued against such a
02 “mechanical” application of the Guidelines, (Dkt. 10, Att. 1, at 4), advocating instead for two
03 alternative approaches. Under the first approach, the sentencing court would use the net weight
04 of the methamphetamine *mixture* to determine base offense level, rather than the amount of *actual*
05 methamphetamine, to yield a total offense level of 29 and an advisory range of 87-108 months.
06 (*Id.* at 5-6; CR Dkt. 18, at 3.) Under the second approach, the sentencing court would not
07 consider the six other drug offenses at all because the police could have and should have arrested
08 Mr. Diaz after the first transaction rather than string him along until he faced a much higher
09 sentence based on drug quantities. (Dkt. 10, Att. 1, at 7-8.) This “sentence entrapment” approach
10 would yield a total offense level of 23 and an advisory range of 46-57 months. (CR Dkt. 18, at
11 3.) Mr. Tsuchida then lobbied for a 60-month sentence, the lowest sentence allowable by statute
12 and the plea agreement, by referring to Mr. Diaz’s history of hard work, his dependent family
13 members, his lack of a criminal history, the drug addiction that drove him into crime, his low-level
14 status in the drug operation, and his post-sentence removal from the country. (Dkt. 10, Att. 1,
15 at 7-13; CR Dkt. 18, at 6-8.)

16 That Mr. Tsuchida’s arguments did not ultimately prevail does not mean that his
17 performance fell below an objective standard of reasonableness. In fact, there is every indication
18 that Mr. Diaz benefitted from counsel’s vigorous representation. Mr. Diaz was sentenced to 108
19 months, i.e., 9 years. Had he been convicted of all the drug counts, rather than pleading guilty to
20 a single count, he would have faced a mandatory minimum of 10 years. *Compare* 21 U.S.C. §
21 841(b)(1)(A) (mandatory minimum sentence of 10 years) *with* 21 U.S.C. § 841(b)(1)(B)
22 (mandatory minimum sentence of 5 years); *see also* *Grissom*, 525 F.3d at 698 n.4 (“[A]lthough

01 relevant conduct has a substantial effect on the sentencing guidelines range for drug crimes, it does
02 not raise the statutory minimum or maximum for the crime of conviction.”). Had the sentencing
03 court adopted one of Mr. Tsuchida’s novel arguments, Mr. Diaz would be serving a substantially
04 shorter sentence. Mr. Diaz has thus failed to demonstrate ineffective assistance of counsel with
05 respect to Mr. Tsuchida’s argumentation about relevant conduct.

06 **CONCLUSION**

07 For the reasons set forth above, the Court recommends that Mr. Diaz’s § 2255 motion be
08 DENIED. No evidentiary hearing is required as the record conclusively shows that Mr. Diaz is
09 not entitled to relief. A proposed Order of Dismissal accompanies this Report and
10 Recommendation.

11 DATED this 16th day of January, 2009.

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13 Mary Alice Theiler
14 United States Magistrate Judge
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